Supreme Court of the United States

OCTOBER TERM—1944

HARRY M. KOHN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI

Opinions Below

No opinions were rendered by the Court of Appeals, (292 N. Y. 597) or the Appellate Division (266 App. Div. 995), in this cause. The Court of Special Sessions, upon finding the defendant guilty, handed down no opinion, except that the Presiding Justice made certain oral remarks appearing at pages 206 and 207 of the record, which related to the consideration of evidence by the Court and are quoted in the appendix (*infra*, p. 25).

Jurisdiction

Jurisdiction of this Court is invoked upon the ground that there is drawn in question the validity of a statute of the State of New York, to wit, Section 551 of the

Penal Law, on the ground of its being repugnant to the Constitution of the United States, and the decision of the Court of Appeals of the State of New York, which is the highest Court of said State in which a decision in this suit could be had, is in favor of its validity. This Court's authority to grant the writ prayed for by the foregoing petition is found in Section 237(a) of the Judicial Code (Act of February 13, 1925, Chapter 229, 43 Stat. 936, 937). A discussion of the Court's jurisdiction and of the substantial nature of the question involved appears above in the petition under the heading "Jurisdiction" (p. 5) to which there is no occasion to add anything at this point.

Statement of the Case

A statement of the case is contained in the petition for certiorari, supra (p. 2) under the heading "Summary and Short Statement of the Matter Involved." It will not be here repeated.

The Statute Involved

Penal Law, § 551. *Sending threatening letters:*

> "A person who, knowing the contents thereof, sends, delivers, or in any manner causes to be sent or received any letter or other writing threatening to do any unlawful injury to the person or property of another, or *any person who shall knowingly send or deliver or shall make and for the purpose of being delivered or sent, shall part with the possession of any letter, postal card or writing with or without a name subscribed thereto or signed with a fictitious name or with any letter, mark or other designation, with intent thereby to cause annoyance to any person*, or any person who shall send, deliver, mail, or in any manner cause to be sent, delivered or mailed any paper or document simulating or intended to simulate a summons, complaint, writ or court process of any kind, is guilty of a misdemeanor."

Specification of Errors

As pointed out in the petition for certiorari supra, it is not the practice in the State of New York to assign error upon the taking of an appeal, inasmuch as the notice of appeal brings up for review the entire judgment or order appealed from. We have, in the petition for certiorari, specified the questions presented for review to this Court *supra* (p. 9). The Court of Appeals specifically committed error:

> (1) In failing to hold that Section 551 of the Penal Law, on its face and in its application to petitioner in the case at bar, is unconstitutional and void as violative of the Fourteenth Amendment to the Constitution of the United States, in that it prescribes no standard of conduct to which petitioner might refer in determining whether his act in sending or causing to be sent the documents specified in the information were or were not prohibited by the statute, and that the statute is without the scope of the police power of the state.
>
> (2) In failing to reverse the judgment of conviction of petitioner by the Court of Special Sessions of the City of New York, New York County, and the judgment of modification and affirmance thereof by the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, and directing petitioner's acquittal and the dismissal of the information.

Summary of Argument

1. Section 551 of the Penal Law, in its application to petitioner in the case at bar, makes the subjective reaction of the recipients of the various decoy cards, that is,

their actual annoyance, the test of whether petitioner has committed a crime defined in the statute in substance as the sending of such cards "with intent thereby to cause annoyance."

In the majority of the counts of the information, petitioner was acquitted, although his conduct was precisely the same and his intent was exactly identical with his conduct and intent in sending the cards in respect of which he was convicted. The interpretation of the statute is such that no one in advance can know whether he is guilty of a crime in sending a letter with intent thereby to cause annoyance until and unless the letter is received and, dependent upon the personality, caprice and temporary mood of the recipient, actual annoyance results. The standard of conduct prescribed is therefore equivocal and subject to variation in each instance, so that what may constitute a crime on one occasion would be guiltless on another. The term "annoyance" itself is not defined by the statute. Its dictionary definition includes a variety of conduct from harmless teasing to less harmless, though by no means injurious vexation. Such a vague standard of conduct violates the Fourteenth Amendment to the Constitution of the United States and deprives a person convicted under such statute of his property and liberty without due process of law.

2. The statute on its face is unconstitutional and void, for the reason that it attempts to legislate in a field not within the proper province for the exercise of police powers.

The statute is not intended, and on its face, does not prohibit the doing of any act injurious to property, person or public welfare, and prescribes at most a standard of good taste or manners in which the public has no interest. It does so furthermore in a manner which prescribes no reasonable standard of conduct that may be observed by anyone, since the causing of annoyance is

so purely a matter of personal whim and reaction that each prosecution under the statute would, of necessity, be determined by the personal opinion of the triers of fact as to what does or does not constitute annoyance.

Argument

This Court has frequently had to consider the constitutionality of criminal statutes attacked because of the vague standards of guilt prescribed. In the early case of *United States* v. *Reese*, 92 U. S. 214, the Court stated, pages 219-220:

> "Laws which prohibit the doing of things, and provide a punishment for their violation, should have no double meaning. A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath; and an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion. * * * Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

Section 551 of the Penal Law has three distinct subdivisions, although they are not separately numbered. The first subdivision not at all here involved prohibits the delivery of a letter or writing threatening unlawful injury. The third subdivision, similarly not here involved, proscribes the delivery of papers simulating Court process. The second subdivision, which we have italicized above (p. 13), is unique in the annals of criminal legislation in that it forbids the doing of an act which threatens no injury to person or property, does not prejudice the public welfare, does not violate public

morals, contains no obscenity or defamation and does not fall within any of the well-recognized fields for exercise of the police power (*Cf. Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 415; *Seattle Trust Co.* v. *Roberge*, 278 U. S. 116; *Eubank* v. *Richmond*, 226 U. S. 137).

It is perhaps not without significance that a careful examination of the laws of the forty-eight states reveals no State other than New York which has a statute making criminal the mere sending of a letter with intent thereby to cause annoyance to any person. The statutes of all of the other states dealing with criminal communications constitute the act of sending a letter or similar document a crime only where the document is threatening, in the nature of extortion or blackmail, tends to breach the peace, or contains obscene language.*

There is only one State other than New York that uses the phrase "with intent thereby to cause annoyance to any person", and that is Michigan (Comp. laws 1929, Section 16814); but this statute specifically provides that the letter must contain "obscene language" to constitute a crime. In the case at bar, it is obvious that the cards contain no threat of injury to person or property, they contain no obscene language, they do not simulate Court process, they do not threaten extortion or blackmail, and they clearly are of such a nature that it is at least doubtful whether persons receiving the same would or would not be annoyed thereby.

The importance of the issue involved is not confined merely to the sending of decoy letters by private detectives attempting to locate missing debtors. The statute on its face is broad enough to include almost every relationship in modern society. To annoy is defined as "1.

*Some typical examples are: Code of Alabama, 1940, Title 14, § 12; Penal Code of California, 1941, § 650; Florida Statutes, 1941, § 836.10; Kentucky Revised Statutes, 1942 § 435.250; Massachusetts, Ann. Laws, C.265 § 25; Revised Statutes, Missouri, 1939, § 4634, Page's Ohio General Code, Ann., § 13385; Wisconsin, Statutes 1939, § 340.45

To be troublesome to; molest; tease; disturb; vex; weary; worry; bother; irritate. 2. To do harm to or ignore continuously or by repeated acts;" * (Funk & Wagnalls Practical Standard Dictionary, New York 1929, p. 54). Of course in the case at bar there were no repeated or continued acts, since each count of the information is based upon a single document.

It is not difficult to perceive that creditor and debtor may irritate each other; that relatives may be greatly bothered by mutual correspondence; that vexatious communication will frequently occur between merchants and their customers; that solicitations by mail often are regarded as troublesome by those approached; that individuals rejected from membership in clubs and business men blackballed by trade associations will be impelled to express their resentment by written protest; that the legion of authors of letters to the editors of our vast group of newspapers and periodicals are not predisposed to pay tribute to the sensibilities of those they criticize; that political circulars distributed and coming into the hands of members of other parties are not generally received with calm and indifference. All of these relations and a multitude of others engender annoyance and usually the communications are intended to annoy, if for no other reason than to evoke an appropriate response sought by the sender. It cannot seriously be contended that this vast, if not all-inclusive body of our citizenry

---

* Extremely pertinent is the comment of the trial Court in *United States* v. *Sharp*, 27 Fed. Cas. 1041 (Approved, *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 92), where in discussing a statute making it a crime to "revolt", the Court stated (p. 1043):—

> "If we resort to definitions given by philologists, they are so multifarious, and so different, that I cannot avoid feeling a natural repugnance, to selecting from this mass of definitions, one, which may fix a crime upon these men, and that too of a capital nature; when, by making a different selection, it would be no crime at all, or certainly not the crime intended by the legislature. Laws which create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid."

are all law breakers or that a statute so classing them could be a lawful exercise of the police power. Annoyance is inherent in discussion, debate, solicitation and the pursuit of competitive business. It is an essential part of our system of democracy.

Unfortunately there is no decision of any Appellate Court in the State of New York construing or limiting the scope of the statute under consideration. The statute was added to the Penal Law (then Section 559 of the Penal Code) by the Laws of 1891, Chapter 120, Section 1. Research has failed to reveal any legislative documents or committee reports discussing the act.

The New York Times of February 16, 1891, page 3, column 7, notes the introduction of the bill by Senator Chase early in the then current session, but includes no comment concerning its purpose. Only three cases appear in the reports of the lower Courts in which opinions were uttered, construing or considering the act. In two of these cases (*People* v. *Mikulski*, 146 N. Y. Supp. 829 and *People* v. *Roban*, 45 N. Y. Supp. (2d) 213, neither officially reported) City Magistrates of the City of New York held that the statute, nothwithstanding its broad verbiage, was not intended to include a complaint made to the police authorities of violation of law, and that such communications were privileged. In the third case (*People* v. *Loveless*, 84 N. Y. Supp. 1114, not officially reported) the Court of Special Sessions of the City of New York, one Justice dissenting, found the Secretary of a trade association guilty where the letter involved was obviously threatening on its face.

The statute as applied by the Court of Appeals in the case at bar includes within its ambit annoyance incidental to the lawful pursuit of a licensed occupation carried on in a customary manner, and since the Court of Appeals has not seen fit to limit the all-inclusive scope of the statute as worded, it is clear that in the opinion of that

Court, the statute includes any type of annoyance where it is the result of the sending of a letter or postal card or similar writing.

What constitutes annoyance is not defined by the statute. Nor does the statute indicate that the annoyance contemplated is such as would disturb or irritate the average prudent person. Its phraseology is precisely the contrary. It is "intent to cause annoyance to any person" which forms the test of criminality. Such a test is purely personal, purely subjective and clearly will vary from case to case with the background, education, psychology and caprice of the individual to whom the letter is addressed. This is particularly important in the case at bar, since the District Attorney has contended that proof of the actual annoyance of the three recipients of the cards forming the basis of the convicted counts is evidence of petitioner's intent to cause annoyance upon the principle that an individual is presumed to be responsible for the natural consequence of his acts; and it was precisely upon evidence of such actual "annoyance" that the Trial Court convicted petitioner (R. 206-7; *infra* p. 25). The fact that in the cases of the acquitted counts the precise conduct and the precise cards did not cause annoyance, seems to be without significance in the view of the People, although we submit that it is of the utmost significance in considering whether the standard of conduct prescribed by the statute is a definite one and not violative of the Federal Constitution..

In *Lanzetta* v. *New Jersey*, 306 U. S. 451, this Court stated at page 453:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in Connally v. General Construction Co., 269 U. S. 385, 391: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to

inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'"

In *Connally* v. *General Construction Co.*, 269 U. S. 385, this Court quoted with approval from the opinion in *United States* v. *Capital Traction Co.*, 34 App. D. C. 592, where a statute making it an offense for any street railway company to run an insufficient number of cars to accommodate passengers "without crowding" was held to be void for uncertainty. Said the Court (pp. 392-3):

"The statute makes it a criminal offense for the street railway companies in the District of Columbia to run an insufficient number of cars to accommodate persons desiring passage thereon, without crowding the same. What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. * * * There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment.

"* * * The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary per-

son can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

These cases are but typical of many in this Court which have held criminal statutes void, because they fixed no definite standards of conduct and attempted to prohibit acts where the test of criminality lay in the purely personal judgment of the jury or Court which might be trying any specific case. In other words, where the test of a crime is the subjective reaction of the triers of the fact as to whether a particular act constitutes a violation, the statute prohibiting such act is void.

United States v. *Cohen Grocery Co.*, 255 U. S. 81, 89;
Stromberg v. *California*, 283 U. S. 359, 369;
New State Ice Co. v. *Liebmann*, 250 U. S. 262, 279-280;
Herndon v. *Lowry*, 301 U. S. 242, 259-264;
Thornhill v. *Alabama*, 310 U. S. 88, 97-8;
Smith v. *Cahoon*, 283 U. S. 553, 564;
International Harvester Co. v. *Kentucky*, 234 U. S. 216, 221;
See also *Gorin* v. *United States*, 312 U. S. 19, 26-7, n. 12.

In the case at bar, petitioner had no evil purpose or wanton or malicious motive in carrying on his business of locating missing debtors. Hundreds, if not thousands, of other persons are engaged under license of the State of New York in the same calling. Petitioner performs his services for persons having unimpeachable right to the information sought—lawyers, finance corporations, department stores, etc. (R. 235). In tracing absconding

debtors, it is hardly to be expected that satisfactory results could be achieved from direct inquiry of those involved. It is obviously an essential part of any locating scheme to employ some form of deception to succeed in obtaining the desired information. It is clear, though, that the method employed caused little, if any, actual annoyance when it is remembered that the District Attorney having access to the thousands of files completed by the petitioner, found only seven to prosecute. Certainly a wanton or criminal intent to annoy would have manifested itself much more frequently and produced many more serious complaints than are evident in the record here. Petitioner obviously had no intent to annoy in sending out the cards. He was carrying on a lawful business of private detective in locating missing debtors. He personally knew none of the people contacted, had no personal malice towards them and had no motive to annoy them. We do not doubt that the legislature, by clear enactment, may limit the activities of private detectives. But it has not restricted the conduct of private detectives to the point of prohibiting them from using decoy letters and cards to obtain information.

The statute in question, in its application to petitioner in the case at bar, prevents him from carrying on a lawful occupation in a lawful manner by means long used. The statute has been applied to petitioner on the basis of a subjective standard of annoyance which petitioner could not possibly anticipate or determine in advance. It seems to be clear that the statute as applied in the case at bar is unconstitutional.

Conclusion

It is respectfully submitted that the Court of Appeals, by its judgment sought to be reviewed, has decided a federal question of substance not heretofore determined by this Court, to wit, the validity of Section 551 of the

Penal Law under the Federal Constitution, and has decided it in a way probably not in accord with applicable decisions of this Court in other cases involving a similar principle which we have cited above. The decision of the Court of Appeals upholds the validity of the State statute against the Constitution of the United States, and we submit does so erroneously.

It is, therefore, respectfully prayed that the petition for a writ of certiorari submitted herewith be granted, so that this Court may review the judgment of the Court of Appeals of the State of New York in said petition referred to.

Respectfully submitted,

SYDNEY J. SCHWARTZ,
Counsel for Petitioner.